

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS MONCIVAIS,

Defendant-Appellant.

---

UNPUBLISHED

May 1, 2008

No. 276992

Saginaw Circuit Court

LC No. 05-025956-FC

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant pleaded guilty to armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 126 to 240 months for the armed robbery conviction and two years for the felony-firearm conviction. In lieu of granting leave to appeal, our Supreme Court remanded this case to this Court for consideration as on leave granted. *People v Moncivais*, 477 Mich 1055; 728 NW2d 445 (2007). We remand for resentencing.

As a factual basis for his plea, defendant admitted that he drove a friend, Roshun Rosas, to a carwash knowing that Rosas was armed and intended to commit a robbery. Rosas committed the robbery at gunpoint and returned to defendant's vehicle with over \$2,000. The presentence report indicates that, during the robbery, Rosas forced two employees to leave the front area of the carwash and enter a mechanical room.

Armed robbery is a class A felony subject to the statutory sentencing guidelines. MCL 777.16y. The trial court scored 15 points for offense variable (OV) 8, which is appropriate when a victim is asported to another place or situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a). Defendant objected to the scoring on the ground that while the circumstances of the offense might support the score, he did not directly engage in the conduct that led to the scoring decision and, unlike other offense variables, OV 8 is not to be scored the same for all offenders when multiple offenders are involved. The trial court disagreed.

A court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

“A sentencing court may consider all record evidence before it when calculating the guidelines, including . . . the contents of a presentence investigation report . . . .” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Plain and unambiguous statutory language is to be applied as written. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001). This Court “may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Nor may this Court “assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute.” *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

Rosas’s conduct supports the trial court’s score for OV 8. Moving the victims to a location where they were secreted from observation by others is sufficient to support a 15-point score. *People v Spanke*, 254 Mich App 642, 647-648; 658 NW2d 504 (2003). Further, the plain language of the statute directs the court to consider the victims’ situation and circumstances during the offense without regard to which offender participated in the relevant conduct. While the instructions do not expressly require the court to impose the same score for all offenders in a multiple offender case, they do not require the court to consider only the individual who personally committed the acts leading to the scoring decision. To accept defendant’s argument would require us to read such limiting language into the statute, which we cannot do. Therefore, we reject defendant’s claim that the trial court erred in scoring OV 8.

We likewise find no merit to defendant’s claim that the trial court improperly based its scoring decision on facts not found by a jury. It is well settled that the holding in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not affect Michigan’s indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

Nevertheless, resentencing is required on a different basis. The minimum sentence range of 126 to 210 months that was utilized by the trial court was based on a calculation of the guidelines that included ten points for the prior record variables. However, the court sustained defendant’s objection to that score, which reduced the score for the prior record variables to zero and changed the sentencing guidelines range to 81 to 135 months. MCL 777.62. Because the trial court did not utilize the appropriate guidelines range and erroneously believed that it was sentencing defendant “at the bottom” of the appropriate guidelines range, we remand for resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski